Supreme Court of the United States

October Term, 1977

No. 77-443

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The petitioners herein apparently seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in both Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, and in Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*

Case No. 74-2320 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al.*, was commenced by the filing of a Complaint in the United States District Court for the Northern District of Ohio, Western Division, on May 28, 1974, entitled *Joseph Skilken and Company, et al. v. City*

of Toledo, et al., Case No. C74-202. Following a pretrial conference on June 5, 1974, various stipulations between the parties, and the Order of the Court of June 18, 1974, the defendants filed their Answer on June 25, 1974. The trial was placed on an accelerated schedule and, over the objection of the defendants, the trial commenced on July 15, 1974, and ended on July 19, 1974. Thus the evidence was completed and the case submitted to the Court less than seven weeks after the Complaint had been filed. The trial was bifurcated by the District Court, with the issues of injunctive and declaratory relief being heard by the Court and the issue of damages reserved for a later trial by jury.

Within three days after the answer to the Complaint was filed, a motion to intervene was filed by the Ragan Woods Homeowners Association and by individual property owners. Other motions to intervene were filed. The Ragan Woods Homeowners Association and others who attempted to intervene perfected an appeal to the Sixth Circuit Court of Appeals, which is Case No. 74-2116 entitled *Joseph Skilken & Co., et al. v. City of Toledo, et al., Ragan Woods Homeowners Association, et al.*, which was consolidated with Case No. 74-2320 for oral argument. Both cases were disposed of by the Opinion of the Sixth Circuit Court filed December 10, 1975.

Following the accelerated trial, the District Court took the case under consideration and on August 28, 1974 issued its Memorandum Opinion (Pet. App. 1A). On October 8, 1974, the Court issued its final Order regarding the declaratory and injunctive relief to be granted to the plaintiffs (Pet. App. 21A).

On October 18, 1974, the defendants, the City of Toledo, et al., filed their Notice of Appeal with the District Court,

and on that same date the plaintiffs filed a Motion to expedite the certification of the record to the Circuit Court. On October 21, 1974, the District Court ordered that the certified record on appeal be transmitted to the Circuit Court by October 25, 1974.

On December 11, 1974, the Clerk of the Circuit Court docketed the defendants' Appeal and the briefing schedule was accelerated so as to require the defendants-appellants' Brief to be filed with the Court on or before January 6, 1975. The plaintiffs filed no cross appeals in the instant matter.

The cases were argued to the Sixth Circuit Court of Appeals on February 3, 1975. On December 10, 1975, the Sixth Circuit Court of Appeals announced and filed its decision and Opinion (Pet. App. 27A).

On January 15, 1976, Plaintiffs filed a Petition for Writ of Certiorari. On January 25, 1977, this Court granted the Writ of Certiorari and vacated the December 10, 1975, judgment of the Court of Appeals, remanding the case for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, and *Hills v. Gautreaux*, 425 U.S. 284. Both of these decisions were rendered by this Court subsequent to the decision of December 10, 1975, by the Court of Appeals. On remand, the Court of Appeals held "(u)pon consideration, we are of the opinion that the result reached in our reported opinion is consistent with each of the above cited decisions subsequently rendered by the Supreme Court."

Thereafter Plaintiffs filed this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The original Complaint filed by the plaintiffs herein claimed jurisdiction under Sections 42 U.S.C. 1401, *et seq.*; 42 U.S.C. 1981, 1982, 1983, 2000 (d), 3601, *et seq.* and the Thirteenth and Fourteenth Amendments to the United States Constitution. The District Court found jurisdiction pursuant to 28 U.S.C. 1331 and 1343 and 42 U.S.C. 3612 and 3617.

The plaintiffs are Joseph Skilken and Company (hereinafter Skilken), a corporation engaged in the development and construction of residential dwelling units; the Toledo Metropolitan Housing Authority (hereinafter TMHA); Sandra Hueston and Jose Maldonado, who claim to represent a class of persons defined by the District Court as: "All low income minority persons residing in the Toledo Metropolitan Area, who, by virtue of their race and poverty, are unable to secure decent, safe, and sanitary housing in the City of Toledo, at rents or prices which they can afford without assistance from the Toledo Metropolitan Housing Authority (TMHA) and who are eligible for the Turnkey III Housing Program."

The defendants in the case are as follows: The City of Toledo (hereinafter City), a body corporate and politic established and organized under the laws of the State of Ohio; Harry Kessler, the elected Mayor of the City of Toledo and a member of the Toledo City Council; Defendants Cook, Copeland, Daoust, Douglas, Galvin, Nies, Pietrykowski and Reddish are the duly elected Council members of the City of Toledo; the defendant, City Plan Commission (hereinafter Commission), a commission established and organized under the statutes of the State of Ohio, Ohio Revised Code Sections 3735.27, *et seq.*, and the ordinances of the City of Toledo; Defendants Burke, Cooke,

Martin, Schimmel and Stoepler are members of the Commission appointed pursuant to the statutes of the State of Ohio and the ordinances of the City of Toledo. Unless specifically indicated, the defendants will hereinafter be collectively referred to as the "defendants."

REASONS FOR DENYING THE WRIT

A. CERTIORARI SHOULD BE DENIED IN CASES WHICH INVOLVE SOLELY A QUESTION OF THE WEIGHT OF THE EVIDENCE.

The gravamen of petitioners' complaint is dissatisfaction with the Appellate Court's assessment of the evidence. The legal analysis set forth in support of petitioners' claim of conflict among the Circuits is predicated upon inferences, conclusions, assumptions, and evaluations which are contrary to the facts as found by the Court of Appeals. In essence, petitioners are disputing, either directly or indirectly, every important factual finding which the Appellate Court deemed relevant to its decision. At page five of their Petition for Writ of Certiorari, Petitioners say:

> "The facts on which this Petition is based are contained in the record made at trial. Most of the facts are succinctly set forth in the District Court's opinion. In the course of its opinion reversing the judgment of the District Court, the Court of Appeals ignored certain key facts found by the lower court and expressed some disagreement with certain of the trial court's conclusions. The appellate court, however, did not purport to hold the District Court's findings clearly erroneous. *Plaintiffs will note those areas of disagreement in this Statement of the Case*, with appropriate references to the record." (emphasis added)

A few specific examples will serve to demonstrate the fundamental disagreement between petitioners and the Court of Appeals with regard to the sufficiency of the proof concerning discriminatory intent and effect. The Court of Appeals rejected petitioners' claim that Toledo is a racially segregated city. The Court found that black families are living in "virtually all parts of Toledo and that blacks have not been excluded from the subdivisions in question." *Joseph Skilken & Co. v. City of Toledo,* 528 F.2d 867 at 879 (Sixth Cir. 1975). The Appellate Court further concluded that petitioners had failed to demonstrate the existence of official discriminatory intent, and that the District Court was in error in inferring such a motive from the record. *Joseph Skilken & Co., supra,* at 879.

The definition of the class of plaintiffs as originally alleged in the complaint herein and subsequently certified by the District Court by its order of October 8, 1974 (page 21A of the Petition for Writ of Certiorari), is those "eligible for the Turnkey III Housing Program." The Appellate Court also used eligibility in defining the class of persons affected by the actions of the Plan Commission and the City Council. The Appellate Court found from the evidence that 79 percent of those eligible for public housing in Toledo are white. Petitioners now disagree with this definition and prefer to include only those people on TMHA's waiting list in the class of persons affected by the governmental action. The evidence pertaining to the racial composition of the group entitled to housing assistance in Toledo demonstrates that public housing is not black housing in the context of this case, and is probative evidence that the decisions of the city officials were not discriminatory in either purpose or effect. Thus the Court held that the governmental agencies and the residents of the neighborhoods concerned have a legitimate interest in

preserving the value of their homes, and such a goal is not racially discriminatory *per se,* particularly where 79 percent of those eligible for housing assistance are white.

The Court of Appeals has evaluated the record on two separate occasions, once in the appeal from the judgment of the District Court, and again on remand from this Court. In order to reach the statutory and constitutional claims asserted by petitioners, this Court would first be required to weigh the evidence and make a determination that the findings of the Appellate Court are clearly erroneous. Only after the instant case has reached such posture would it be possible to determine the question of conflict among the circuits. This Court has reiterated on numerous occasions that certiorari will be denied in cases involving solely a question of whether the Court of Appeals fairly assessed the record and made correct factual conclusions, *N.L.R.B. v. Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); *Rogers v. Missouri P.R. Co.,* 352 U.S. 559 (1957) (Separate opinions of Justices Frankfurter, Harlan and Burton); *U. S. v. Johnson,* 268 U.S. 220 (1925); *Southern Power Co. v. North Carolina Public Service Co.,* 263 U.S. 508 (1924). The Writ of Certiorari should be denied accordingly.

B. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioners claim to find a conflict between the Sixth Circuit's decision in the instant case and *United States v. City of Black Jack,* 508 F.2d 1179 (Eighth Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283 (Seventh Cir. 1977); *Resident Advisory Board v. Rizzo,* ..... F.2d ..... (Third Cir. August 31, 1977). Petitioners apparently claim that the Sixth Circuit has rejected the

proposition that a *prima facie* case of violation of Title VIII can be established by showing that the action in question had a racially discriminatory effect. There is nothing in the opinion by the Sixth Circuit which would suggest that it has rejected the "effects standard". The plain fact is that the Sixth Circuit found that the governmental actions in question did not have a racially discriminatory effect.

The Sixth Circuit said:

> "Toledo's population in 1970 was 329,068, of whom 86% were white, 14% were black, and 1% other minority groups. 28% of the population, or 35,000 households, were eligible for public housing; 21% of those eligible were black, and 79% were white. Thus there are more than three times as many whites who need public housing than there are blacks needing housing." 528 F.2d 867, at 878.

Not only are there three times as many whites as blacks who need public housing, but the percentage of those eligible is very nearly equivalent to the percentage of minorities in the overall population of the city.

Likewise, the Sixth Circuit found that the actions by the City of Toledo did not result in the perpetuation of racial segregation or the prevention of interracial relationships. Thus the Sixth Circuit Court of Appeals said:

> "The fact is that black families are living in virtually all parts of Toledo. This was testified to on cross-examination of plaintiff's witness, Emerson Cole, a black member of Ohio Civil Rights Commission, who had lived in Toledo for forty-three years, and who testified as follows:
>
> Q. It is a fact, is it not, that there are black people living in virtually every area of the city of Toledo?

> A. Yes. (88a)
>
> Negro families have not been excluded from the Ragan Woods subdivision, nor have other minorities who have the money to purchase property there. In Ragan Woods there are also first and second generation Americans of Greek, Italian, Polish, Hungarian, Czechoslovakian, Irish, English, Swedish, and Scottish descent."*

Simply stated, the Sixth Circuit held that the decisions of public officials, acting within the scope of their authority and pursuant to a comprehensive and facially neutral zoning ordinance, do not violate Title VIII in the absence of discriminatory effect or purpose. The instant case does not involve the issue of the proper test or standard to be applied in ascertaining whether a Title VIII violation has occurred. At bottom, petitioners are raising factual and not legal questions. All of the following issues were fully considered by the Sixth Circuit and resolved against petitioners on the basis of the *evidence*: (1) The discriminatory impact or effect of the government's decision denying zoning changes or disapproving plats; (2) The motive or interest of the governmental officials in taking the actions complained of; (3) The degree to which public officials are responsible for alleged racial discrimination in Toledo; and (4) The extent to which the officials in question may consider property values in determining requests

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*The Seventh Circuit in *Arlington Heights, supra,* analyzed the potential discriminatory effect of governmental actions from two aspects: (1) the disparate effect, if any, on different racial groups, which the court termed "the first sense"; and (2) the possibility of perpetuating racial segregation and preventing interracial relationships which the court termed "the second sense." This analysis is very similar to that of the Sixth Circuit as indicated by the two quotations set forth in the body hereof. Although the Sixth Circuit did not utilize these specific terms, the court found no disparate effect from the governmental actions, and also found that Toledo was not a segregated city.

for zoning changes. The Court of Appeals held that petitioners failed to prove a *prima facie* case under Title VIII, as to either discriminatory purpose or effect.

In fact the Sixth Circuit Court of Appeals specifically found that the action of the City Council and the Plan Commission did not result in an "in effect" discrimination. The Court said:

> "Nor do we regard the refusal of the City Council to rezone and the Plan Commission to replat, as obstructing the rights of minorities to housing, upon which an inference of discrimination 'in effect' may be drawn against those bodies."

(1) The Seventh Circuit's decision in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (Seventh Cir. 1977).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Seventh Circuit in *Arlington Heights, supra.* Petitioners claim that a showing of discriminatory effect is sufficient to establish a Title VIII violation. As hereinbefore pointed out, the Sixth Circuit specifically found that the decisions under consideration in the *Skilken* case did not result in a discriminatory effect. In any event, even the decision by the Seventh Circuit in *Arlington Heights* did not hold that discriminatory effect, in and of itself, was sufficient to establish a violation of Title VIII [42 U.S.C. § 3604 (a)] by a governmental entity:

> "Although we agree that a showing of discriminatory intent is not required under section 3604 (a), we refuse to conclude that every action which produces discriminatory effects is illegal. Such a *per se* rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases. (Citations omitted) Rather, the courts must use their discretion in deciding whether, given the particular circumstances of each case, relief should be granted under the statute." *Arlington Heights, supra,* at 1290.

The racial composition of the City of Toledo is so unlike that of the village of Arlington Heights that any attempt to equate the two is meaningless. In 1970 the City of Arlington Heights had a population of 64,884, of whom 27 were black. That is, Arlington Heights was a 99 96/100 percent pure white city. The Chicago metropolitan area, of which Arlington Heights is a part, was 82 percent white, and 18 percent black. By contrast, Toledo's population in 1970 was 329,068, of whom 86 percent were white, 14 percent were black, and 1 percent other minority groups. Toledo had black people living in virtually every area of the city. Consequently, rejection of the housing under consideration in the instant case (wherein 79 percent of those eligible for such housing were white) did not have any racially discriminatory effect in the *Arlington Heights* "second sense."

In the Chicago metropolitan area 40 percent of those eligible for the housing under consideration in the *Arlington Heights* case were black. Since the proposal under consideration in the *Arlington Heights* case was for 190 units (even if you assume that the prospective black occupants of those units would have no children) such units would have been occupied by approximately 155 to 160 blacks. Such occupancy would have resulted in an increase of 600 percent in the total black population in the village of Arlington Heights.

Even under these very extreme circumstances, the Seventh Circuit held that "it is unclear . . . whether the Village's refusal to rezone would necessarily perpetuate

segregated housing in Arlington Heights." *Arlington Heights, supra,* at 1291. The Court stated that such a determination would depend on the amount of land within the village's corporate limits which was properly zoned for multiple family dwellings and on which the village would have no objection to the construction of a low cost housing project. Therefore, even under these extreme circumstances, the Seventh Circuit Court of Appeals was unwilling to find a discriminatory effect and remanded the case to the District Court to take additional evidence pertaining to the availability of alternate sites.

In the *Arlington Heights* case, the Seventh Circuit found that even though 40 percent of the people in the Chicago metropolitan area eligible for public housing were black, that was a "relatively weak" showing of discriminatory effect in the *Arlington Heights* "first sense." *Arlington Heights, supra,* at 1291. That "relatively weak" finding was made in spite of the fact that 18 percent of the people in the Chicago metropolitan area were black and that, therefore, a decision affecting public housing affected over twice the percentage of blacks as existed in the population as a whole.

By contrast, those eligible for public housing in the City of Toledo were 79 percent white and only 21 percent black. This percentage of distribution very closely parallels the percentage distribution of blacks and whites in the population of the city as a whole (86 percent white—14 percent black).

(2) The Eighth Circuit's decision in United States v. City of Black Jack, 508 F.2d 1179 (Eighth Cir. 1974), cert. denied 422 U.S. 1042 (1975).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Eighth Circuit in *Black Jack, supra.* Petitioners, however, never analyze any of the facts of the *Black Jack* case.

The uncontested facts in that case were that:

> ". . . at the relevant time the area which is now the City of Black Jack was virtually all white, with a black population of between 1% and 2%. The area of St. Louis County north of Interstate Highway 270, which includes Black Jack, is approximately 99% white." *Black Jack, supra,* at 1183.

In addition, the drive to incorporate the Black Jack area began as a result of HUD giving the developer of the units under construction a "green light" for federal funding. That drive resulted in incorporation of Black Jack on August 6, 1970 (two months after the announcement of federal funding). Within three months thereafter the city enacted a zoning ordinance prohibiting the construction of any new multiple family dwellings and making existing multiple family dwellings non-conforming uses.

Clearly this is a situation unlike that in the City of Toledo and just as clearly justifies a finding of discriminatory effect in the *Arlington Heights* "second sense." Such a finding is, of course, not justified by the facts in this case, and was specifically rejected by the Sixth Circuit.

In addition the Court in the *Black Jack* case found more than merely a discriminatory effect. The Eighth Circuit said:

> "The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was
>
> '. . . in large measure the result of *deliberate racial discrimination in the housing market by the real*

estate industry and by agencies of the federal, state, and local governments. . . .'" (emphasis added) *Black Jack, supra,* at 1186.

All of which was stipulated to by the parties at trial.

The Eighth Circuit went on to say:

"Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that "has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1260 (N.D.Ohio, 1973), rev'd, 500 F.2d 1087 (6th Cir. 1974). *See also* Crow v. Brown, 332 F.Supp. 382, 384 (N.D.Ga., 1971), aff'd per curiam, 457 F.2d 788 (5th Cir. 1972). Park View Heights was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act. The Board of Directors of the Park View Heights Corporation was one-half white and one-half black. Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white." *Black Jack, supra,* at 1186.

That deliberate racial discrimination by the federal, state, and local government is the kind of circumstance required by the Seventh Circuit in *Arlington Heights* in addition to a mere discriminatory effect.

Not only is there no discriminatory intent in this case, such as was found to exist in *Black Jack,* but there is not even any discriminatory effect in any sense.

(3) Decision by the Third Circuit in Resident Advisory Board v. Rizzo, ... F.2d ..... (Third Cir. August 31, 1977).

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with that of the Third Circuit in *Rizzo, supra.*

Again petitioners totally fail to undertake any analysis of the facts of the *Rizzo* case. By contrast both the District and the Circuit Courts went into a lengthy factual analysis of the events leading up to the scuttling of the Whitman project. There are two major features of the *Rizzo* case which are not found in the instant case.

First, there was the most direct evidence of intentional discrimination by the City which it is possible to imagine. During the mayoral campaign of 1971, Frank Rizzo, who was subsequently elected mayor of Philadelphia, campaigned in opposition to public housing. Mayor Rizzo's testimony is summarized at considerable length in the opinion of the District Court [*Resident Advisory Board v. Rizzo,* 425 F. Supp. 987 at 1001, (1976)] which is quoted at length by the Third Circuit. The mayor testified that:

". . . he considered public housing to be the same as Black housing in that most tenants of public housing are Black (citations omitted). Mayor Rizzo therefore felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving in with them (citations omitted). Furthermore, Mayor Rizzo stated that he did not intend to allow PHA to ruin nice neighborhoods (citations omitted)." Slip Op. at 19.

Similar statements appear throughout Mayor Rizzo's testimony. The discriminatory intent on the part of the City could hardly be clearer.

Second, the activities of the City, the City's Housing Authority (PHA), and its Redevelopment Authority (RDA), had the effect of changing a previously racially mixed neighborhood into a virtually all white neighborhood. Thus the Third Circuit Court of Appeals found that:

> "Like other neighborhoods in urban America, Whitman has undergone a transformation in its racial composition over the past several decades. Unlike most, however, Whitman has changed from an originally racially mixed area to one which is virtually all-white. Moreover, this change has resulted almost wholly from the urban renewal efforts of the defendant governmental agencies.
>
> As revealed by the district court's analysis, Whitman's present all-white population must be viewed against a backdrop of, on the one hand, a growing concentration of blacks and other minorities in discrete, insular sections of Philadelphia (North Philadelphia, West Philadelphia and South Central Philadelphia), and on the other, a reduction in the number of blacks residing in other parts of the city, including Whitman. The net result has been, in the words of the district court, that .[t]he City of Philadelphia is today a racially segregated city. 425 F.Supp. at 1006.'" Slip Op. at 8.

The activities of the City, its PHA, and RDA could be found to be a program not of Urban Renewal, but of "Negro removal" much as the Court found in the case of *Garrett v. Hamtramck*, 503 F.2d 1236 (Sixth Cir. 1974).

The Third Circuit went on to summarize the racially discriminatory impact of the activities of the City of Philadelphia, its PHA, and its RDA as follows, to wit:

> "Whereas originally almost 45% of the families living in the Whitman project area were black, by the time urban renewal clearance was completed and the surrounding blocks reconstructed, virtually no black families were to be found in the area. The evidence produced by the plaintiffs, which revealed that the urban renewal activities of the defendants had the result of removing black families from the Whitman site, leaving Whitman as an all-white community, was sufficient to establish a *prima facie* case of discriminatory effect. Nor can there be any doubt that the impact of the governmental defendants' termination of the project was felt primarily by blacks, who make up a substantial proportion of those who would be eligible to reside there." Slip Op. at 44.

The Court of course concluded that the totality of action by the defendants had a racially discriminatory effect, but even under the extreme circumstances present in that case concluded that "The mere showing of a racially discriminatory effect does not, however, necessarily constitute a violation of § 3604 (a)." Slip Op. at 45.

There is no similarity at all between the racially discriminatory intent of the City of Philadelphia and its mayor and the program of Negro removal by the City, its PHA, and its RDA on the one hand, and the situation under consideration in the instant case on the other.

C. THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioners contend that the Sixth Circuit's decision in the instant case conflicts with applicable decisions of

this Court. As hereinbefore mentioned, the plain fact is that the Sixth Circuit found that the governmental action in question did not have a racially discriminatory effect. Nowhere in their petition do petitioners attempt to analyze or set forth the holding of the Sixth Circuit in this case. Instead they state that ". . . *if* the Sixth Circuit *impliedly* held that the plaintiffs failed to prove '*intent*'. . . ." (Pet. p. 31) (our emphasis) and that "At best, the Court of Appeals *implicitly assumed* that plaintiffs' burden of proof under Title VIII . . . ." (Pet. p. 32) (our emphasis), and ". . . the Court of Appeals *presumably* ruled that because plaintiffs were challenging municipal exercises of land use authority . . . ." (Pet. p. 32) (our emphasis). Nothing in the Sixth Circuit's opinion justifies the implications, suppositions, and presumptions engaged in by petitioners. The plain fact is that the Sixth Circuit found there was no racially discriminatory effect in any sense. Since that is the case, the Sixth Circuit's decision does not conflict with the Title VII decisions of this Court and does not conflict with this Court's decision in *Arlington Heights, supra.**

The reference to the *Gautreaux* case demonstrates even more dramatically petitioners' failure to understand

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*It is interesting to note that petitioners engage in the same type of analysis of this Court's mandate to the Sixth Circuit. The mandate was simply that the Sixth Circuit give further consideration to the case in light of intervening decisions by this Court in *Arlington Heights* and *Gautreaux*. Yet petitioners state unequivocally that the mandate

> ". . . required the Court of Appeals to decide expressly at least the following questions: (1) whether plaintiffs' burden of proof under Title VIII is to prove only that the effect of the challenged conduct is racially discriminatory, or to prove a discriminatory 'intent' or 'purpose', before liability attaches; (2) if 'intent' must be shown, whether the plaintiffs satisfied the evidentiary standard for 'intent' outlined in *Arlington Heights*; and (3) if liability were found, whether, under the principles of *Gautreaux*, the District Court was authorized to order the defendants to develop a city-wide remedial plan to eliminate discriminatory barriers."

the holding of the Sixth Circuit. Since the Sixth Circuit found that there was no discriminatory effect, a consideration of relief and of whether the kind of relief granted in *Gautreaux* would be appropriate in this case is obviously inappropriate. In any event, this Court's remand to the Sixth Circuit for further consideration in light of the intervening decision in *Gautreaux* does not suggest disagreement with the Sixth Circuit's holding but instead does suggest disagreement with the District Judge's affirmative relief order. This Court contrasted its decision in *Gautreaux* with its decision in the case of *Milliken v. Bradley*, 418 U.S. 717 (1974) as follows:

> "In sum, there is no basis for the petitioner's claim that the Court-ordered metropolitan relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD, nor displace the rights and powers accorded government entities under federal or state housing statutes or existing land use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD."

In this case the remedial decree made by the District judge did require the local government to submit a public housing proposal to the District judge. In addition, the remedial decree made by the District judge would displace the rights and powers accorded local governmental en-

tities under existing land use laws. In fact, the District judge ordered the City Council to enact a change in the existing land use laws.

In *Gautreaux* the Supreme Court found a limitation which would prevent the making of a remedial order such as the District judge attempted to make here.

> "As we noted in part II *supra* the District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct."

CONCLUSION

It is therefore respectfully submitted that the decision by the Sixth Circuit Court of Appeals in this case does not conflict with decisions in other Circuits and does not conflict with decisions of this Court and that, therefore, the Petition for Writ of Certiorari ought to be denied.

Respectfully submitted,

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